ORIGINAL

STATE OF MICHIGAN
IN THE SUPREME COURT
APPEAL FROM THE COURT OF APPEALS
(Murray PJ, and Gage and Kelly JJ)

JOSEPH STAMPLIS and THEODORA STAMPLIS,

Plaintiffs-Appellees,

v

ST. JOHN HEALTH SYSTEM, d/b/a RIVER DISTRICT HOSPITAL and G. PHILLIP DOUGLASS,

Defendants-Appellants,

and

HENRY FORD HEALTH SYSTEMS, d/b/a HENRY FORD HOSPITAL, et al.,

Defendants.
_____/

Supreme Court Nos: 126980; 127032

Court of Appeals No: 241801

St. Clair Circuit Court No: 01-1051-NH
Hon. Daniel Kelly

PLAINTIFFS-APPELLEES' COMBINED BRIEF ON APPEAL

*** * * ORAL ARGUMENT REQUESTED*****

PROOF OF SERVICE

Submitted By:
Victor S. Valenti (P36347)
Fieger, Fieger, Kenney & Johnson, P.C.
Attorneys for Plaintiffs-Appellees
19395 W. Ten Mile Road
Southfield, Michigan 48075
(248) 355-5555

RECEIVED
JUL 14 2006
CORBIN R. DAVIS
CLERK SUPREME COURT

Table Of Contents

Page(s)

TABLE OF AUTHORITIES

FEDERAL CASES

STATE CASES

STATE STATUTES

AUTHORITIES

Counterstatement Of The Questions Presented

I. Do The Unqualified Words Of MCL 600.2925d Make It Absolutely Clear That The Legislature's 1995 Amendment Of That Statute Abrogated The Common Law Rule That The Release Of The Active Tortfeasor Also Dismisses The Passive Tortfeasor, Thereby Overruling *Theophelis v Lansing Gen Hosp*, 430 Mich 470 (1987)?

Plaintiffs-Appellees say "Yes."

Defendants-Appellants say "No."

The Court of Appeals did not address this question.

The Trial Court did not address this question.

II. If *Theophelis* Remains Good Law, Did The Court Of Appeals Nonetheless Correctly Reverse The Summary Disposition For River District Hospital Where The Trial Court Erred At Law By Failing to Effectuate The Undisputed Intent Of Plaintiffs' Counsel To Continue That Suit As Recognized And Expressed By The Trial Court Without Disagreement By Defendants?

Plaintiffs-Appellees say "Yes."

Defendants-Appellants say "No."

The Court of Appeals said "Yes."

The Trial Court would say "No."

III. If *Theophelis* Is Still Good Law, Did The Court Of Appeals Properly Remand To The Circuit Court For Entry Of An Order Vacating The Stipulation And Order Dismissing Dr. Douglass With Prejudice?

Plaintiffs-Appellees say "Yes."

Defendants-Appellants say "No."

The Court of Appeals said "Yes."

The Trial Court would say "No."

IV. Have Defendants Offered Any Cognizable Reason To Support Overruling *Larkin v Otsego Memorial Hosp Ass'n*, 207 Mich App 391 (1994)?

Plaintiffs-Appellees say "No."

Defendants-Appellants say "Yes."

The Trial Court And The Court Of Appeals Took
No Position On This Issue.

Counterstatement Of Judgment Appealed From And Relief Sought

On January 27, 2006, this Court granted the separate Applications of Defendants River District Hospital ["RDH" or "the Hospital"] (No. 126980) and Dr. G. Phillip Douglass, D.O. (No. 127032) which seek to overturn the June 1, 2003 Court of Appeals Opinion (RDH Apx. 16a) that reversed St. Clair Circuit Judge Daniel Kelly's May 3, 2002 dismissal of Defendant Hospital and vacated the April 16, 2002 stipulation and order dismissing Dr. Douglas with prejudice. Plaintiffs concede that this Court has jurisdiction under MCR 7.301(A)(2).

For the reasons set forth in this Combined Response, the Court of Appeals properly relieved Plaintiffs from the Judgment dismissing RDH. To the extent his continued presence in the suit is deemed necessary to hear and determine the vicarious liability of the RDH, the Court of Appeals also properly set aside the stipulation dismissing Dr. Douglass. Based on the decision by the Court of Appeals and the express language of MCL 600.2925d, this Court should affirm the Court of Appeals decision reversing the trial court's dismissal of Defendant River District Hospital and permit this case that has been pending for more than eight years to proceed to jury trial in the St. Clair Circuit Court.

Introduction

Egged on by defense counsel's conspiracy of silence, the trial court dismissed, on procedural grounds, the claim of Plaintiff Joseph Stamplis who was rendered paraplegic by the medical malpractice of Defendant River District Hospital and its agents. The Court of Appeals majority recognized the serious injustice that the trial court perpetrated upon Plaintiffs by denying them their day in court. The Court of Appeals reversed because Judges Gage and Kelly properly refused to condone Defendants' "sporting theory of justice" that a defendant ought to be given a fair opportunity to beat the case even if it can do so only by surprise or ambush. The Court further recognized that the trial court was fully aware of Plaintiffs' counsel's intention to proceed against River District Hospital, and should not have allowed Defendants to engage in such chicanery.

Moreover, the common law rule that "a valid release of an agent for tortious conduct operates to bar recovery against the principal on a theory of vicarious liability, even though the release specifically reserves claim against the principal," which was most recently stated by this Court in *Theophelis v Lansing Gen Hosp*, 430 Mich 473, 480 (1988), has been abrogated by the 1995 amendment to MCL 600.2925d. That amendment makes it absolutely clear that the statute now provides that the release of the release of the agent no longer acts as a dismissal of the claim against the principal.

Accordingly, this case should be remanded for trial against Defendant River District Hospital. If this Court agrees that MCL 600.2925d permits Plaintiffs to proceed to trial against the Hospital without the agent Dr. Douglass, he can be dismissed as Plaintiffs originally intended. But to the extent that the dismissal of Dr. Douglass might be found to compel the

dismissal of River District Hospital, the Court of Appeals majority correctly determined that the stipulation dismissing Dr. Douglass must be vacated.

Counterstatement Of Material Facts And Proceedings

A. Underlying Facts, Plaintiffs' Theory Of The Case, And Summary Of The Proceedings Before April 16, 2002.

This is a complex failure to diagnose/treat medical malpractice case. As a result of Defendants' failure to timely diagnose an epidural abscess in the then 53-year-old Plaintiff Joseph Stamplis,[1] he is now a paraplegic who has endured excruciating pain on a daily basis for the last nine-and-a-half years.

On January 27, 1997, at 5:30 a.m., Mr. Stamplis presented at the Defendant River District Hospital emergency room complaining of nausea, lightheadedness and intense back pain which had been getting progressively worse since it started the previous day (Apx pg 102aa-103aa: Complaint ¶36). Mr. Stamplis was seen there by Dr. Paul Budnick, a resident physician. Dr. Budnick performed a physical exam and a cursory neurological exam. Dr. Budnick diagnosed muscle spasms in Mr. Stamplis' chest and back, gave him Toradol and Valium and sent him home with a prescription for Toradol and instructions to follow up with a physician in five to ten days (Apx pg 103aa: Complaint, ¶37).

As the day progressed, despite taking the Toradol, Mr. Stamplis' pain continued to get worse. At about 8:30 p.m., on the same day, Mr. Stamplis returned to the River District Hospital Emergency Room "complaining of pain in his back of 12 on a scale of 1 to 10, and an inability to walk or stand" (Apx pg 103aa: Complaint, ¶38). Dr. Gerald Fisher, a resident physician, ordered x-rays of Mr. Stamplis' chest, cervical spine and shoulder which were negative, and he discharged

[1] The claim of Theodora Stamplis is for loss of consortium (Apx pg 121aa: Complaint, Count VIII).

him with more pain killers, Demerol, Vicodin and Vistaril and an instruction to use moist heat on his back (Apx pg 103aa: Complaint, ¶¶39-41).

On January 29, 1997, at about 9:30 a.m., Mr. Stamplis again returned to River District Hospital where he saw Defendant Dr. Phillip Douglass (Apx pg 103aa: Complaint, ¶¶42-43). He had an elevated temperature, and a burn on his back because he had fallen asleep with the heating pad on, but his major complaint was his continuing severe back pain (Apx pg 103aa: Complaint, ¶42). Dr. Douglass ignored the back pain complaint and addressed only the burn for which he prescribed Silvadene Cream and discharged Mr. Stamplis (Apx pg 103aa: Complaint ¶43). He never looked at the records from the prior two emergency room visits.

On January 30, 1997, Mr. Stamplis was seen by his family doctor for the burn on his back and continued back pain (Apx pg 103aa: Complaint, ¶45). He saw his family doctor again on January 31, 1997, complaining of gait disturbance, loss of equilibrium and numbness in his lower extremities (Apx pg 104aa: Complaint, ¶46). Subsequently, Mr. Stamplis was misdiagnosed with Guillain-Barre Syndrome. Finally, on February 1, 1997, at about 6:00 p.m., an MRI was done at Henry Ford Hospital in Detroit where Mr. Stamplis had been transferred from Port Huron Mercy Hospital (Apx 104aa: Complaint, ¶¶50-54). The MRI showed a thoracic epidural abscess with findings suggestive of cord edema (Apx 105aa: Complaint, ¶55). Mr. Stamplis immediately underwent a T2, T3, T4 and partial T5 laminectomy with evacuation of the epidural abscess (Apx pg 105aa: Complaint, ¶56). As a result of the delay in diagnosis of a progressive myelopathy, Mr. Stamplis was rendered paraplegic from the thoracic line down (Apx pg 105aa: Complaint, ¶57). Mr. Stamplis has the worst case of chronic pain syndrome his rehabilitation doctor has ever seen. He has the worst quality of life of any patient his doctor has ever treated.

Plaintiffs filed suit against the three hospitals and several doctors including Budnick, Fisher and Douglass from the River District Hospital Emergency Room (Apx pg 113aa-116aa: Complaint Count V).

Count I of Plaintiffs' Complaint, paragraph 59, alleges that River District Hospital "**undertook and had the duty to provide Plaintiff JOSEPH STAMPLIS with a competent, qualified and licensed staff of physicians, surgeons, nurses and other employees, agents, servants and/or independent contractors who would treat Plaintiff's decedent's condition, render competent advice, diagnosis, assistance and treatment to said Plaintiff and that such care and treatment would at all times be in accordance with the standards of acceptable medical practice and/or care in the community**" (Apx pg 105aa-106aa; emphasis added). Paragraph 60 further alleges that River District Hospital "**individually and/or through its authorized agents, servants and/or employees breached its respective duties and obligations to Plaintiff JOSEPH STAMPLIS by acting in variance with accepted standards of medical and/or rehabilitative care in this community, and is professionally negligent in the following particulars, which include but are not limited to:**

a. Failure to perform or arrange to have performed adequate neurological examination and/or consultation appropriate to the true diagnosis of a progressive myelopathy;

b. Failure to investigate promptly and intensively progressive back pain, thoracic sensory level and leg weakness with neurological signs of spinal cord involvement in order to make an accurate diagnosis leading to proper management;

c. Failure to promptly and timely perform necessary radiological procedures in order to arrive as quickly as possible at an accurate diagnosis of surgically treatable

myelopathy;

d. Failure to immediately and promptly transfer a patient with progressive myelopathy to a facility competent to render care including surgery if necessary;

e. Any other negligent acts and/or omissions which are revealed over the course of discovery."
(Apx pg 106aa: Complaint, ¶60; emphasis added).

The case, which was filed in Wayne Circuit Court in 1998, was later transferred to St. Clair Circuit Court where it was assigned to Judge Daniel Kelly. On deposition, Plaintiffs' experts testified that the emergency room physicians at River District Hospital did an inadequate neurological examination. Over the course of the three visits, Mr. Stamplis should have, at minimum, been admitted to the hospital for a neurological consultation, or had a neurological consultation in the emergency room. The doctors at River District Hospital failed to make the appropriate diagnosis and failed to order the appropriate diagnostic studies in order to make the proper diagnosis.

With respect to River District Hospital, Plaintiffs' theory is that the Hospital and its physicians failed to timely and properly diagnose and treat the cord compression, spinal epidural abscess. Had any of the River District Hospital Emergency Room physicians done a complete physical examination on the patient, they would have learned that Mr. Stamplis was already experiencing tingling in his legs and feet and that his back pain was becoming progressively worse. Had any of the three physicians who examined Mr. Stamplis at River District Hospital ordered an MRI, which is the diagnostic tool of choice for any type of cord compression, the spinal epidural abscess would have been diagnosed and treated timely.

B. The Trial Court Proceedings

Plaintiffs settled with or dismissed most of the defendants and, on the opening day of trial, the remaining Defendants were River District Hospital, Dr. Douglass and Henry Ford Hospital. Throughout most of the pre-trial proceedings, attorney Jane Garrett alone represented River District Hospital and its emergency room physicians Douglass, Budnick and Fisher. In June 2001, attorney Ralph Valitutti, substituted for attorney Garrett for the Hospital with Garrett continuing to represent Douglass.[2] Nonetheless, at the trial proceedings, the attorneys worked together for the Hospital and Douglass as a "tag team."

On April 16, 2002, before selecting the jury, Judge Kelly met with the parties for a final settlement conference (Apx pg 30aa-38aa: Tr. 4/16/02, pp 4-12). During that fifteen minute meeting, in the presence of all parties and their counsel, including Mr. Valitutti for the Hospital, attorney Garrett, appearing for Defendant Dr. Douglass, announced an agreement with Plaintiffs' counsel, Mr. Kenney, for the "dismissal" of Dr. Douglass without payment:

> "[W]e have agreed that Doctor Douglass who has come up from Texas where he now resides for this trial, he will agree to remain here until he takes the stand to testify, which Mr. Kenney has assured me will be sometime before the close of business on Friday; that Plaintiff will then be dismissed with prejudice, the individual claims against Doctor Douglass as a Defendant. And that is why I will not be offering anything on his behalf." (Apx 35aa: Tr. 4/16/02, p 9).

Mr. Kenney explained his understanding of the agreement as follows:

> "MR. KENNEY: **I intend to dismiss Doctor Douglass as a Defendant and proceed against what I presumed to be his principal, the hospital.**
>
> ***
>
> And the other terms he will remain until the close of business Friday

[2] By this time, Budnick and Fisher had been dismissed.

so that I can put him on the stand, that's part of the agreement, as well." (Apx pp 35aa-36aa: Tr. 4/16/02, pp 9-10; emphasis added).

Agreeing that the dismissal would be "with prejudice," Mr. Kenney specifically qualified the agreement, adding:

> **[B]ut what I don't want to face, Judge, obviously is that I have dismissed the claims against the hospital for the actions of Doctor Douglass. I'm not doing that. He was the actor."** (Apx pg 36aa: Tr. 4/16/02, p 10; emphasis added).

At this point, the court, eager to move settlement discussions along, said:

> "THE COURT: **I understand. I understand that. I am sure they do, too. Next.** (Apx pg 36aa: Tr. 4/16/02, p 10; emphasis added).

Ms. Garrett said nothing further. Mr. Valitutti was silent about the agreement, but offered $300,000 on behalf of the Hospital (Apx 36aa-37aa: Tr. 4/16/02, pp 10-11). After Henry Ford Hospital also made a settlement offer, the court adjourned the proceedings to give the parties the opportunity to talk with their lawyers (Apx pg 38aa-39aa: Tr. 4/16/02, pp 12-13).

When the parties reconvened at 1:25 p.m., Ms. Garrett was still present. Plaintiffs elected to proceed to trial against the two Hospitals [River District and Henry Ford] (Apx pp 39aa-40aa: Tr. 4/16/02, pp 13-14). Ms. Garrett then announced that, "over the noon hour **we prepared a stipulation and order of dismissal"** which had been executed by all counsel and signed by the court (Apx 40aa-41aa: Tr. 4/16/01, pp 14-15; emphasis added). Colloquy about jury selection and challenges then followed (Apx 41aa-45aa: Tr. 4/16/02, pp 15-19).

The first hint to what Defendants' "tag team" was doing came when Mr. Valitutti proposed "to address the court with motions before *voir dire*" (Apx pg 45aa: Tr. 4/16/02, p 19). When the obviously puzzled court asked what motions Mr. Valitutti had in mind, he responded that he had a

motion for summary judgment for River District Hospital Apx pg 46aa: Tr. 4/16/02, p 20). The court stated that jury *voir dire* would proceed (Apx pg 46aa: Tr. 4/16/02, p 20).

When Mr. Kenney asked if Dr. Douglass and Ms. Garrett were leaving, Ms. Garrett suddenly announced that she was staying as co-counsel for the Hospital ("**I guess I'll make an oral appearance for River District Hospital then**") (Apx pg 46aa: Tr. 4/16/02, p 20; emphasis added). Then, Mr. Valitutti chimed in with the following:

> "MR. VALITUTTI: **Is there any objection to Doctor Douglass being present? We're entitled to designated defendant.** (Apx pg 46aa: Tr. 4/16/02, p 21; emphasis added).

Thus, the Hospital chose to have Ms. Garrett continue to participate as co-counsel and to make Dr. Douglass its designated agent/representative for jury *voir dire* despite the just-entered dismissal and despite the fact that the Hospital already had two employees, Connie Hoyin and Frank Palmer, present and available to be its designated representatives (Apx pp 40aa; 47aa: Tr. 4/16/02, pp 14, 21).

The Hospital submitted a five page written motion and brief for summary disposition that looked as if it was prepared over lunch on the same word processing equipment as the Stipulation for Dismissal of Dr. Douglass and, in anticipation of its entry. This motion and brief was obviously drafted by the same person who drafted the Stipulation and Order Of Dismissal --- as both contain the same inaccurate caption which was **never** the case caption during Mr. Valitutti's participation in this case.

When the court reconvened the next morning, the Hospital argued its summary disposition motion (Apx 57aa-59aa: Tr. 4/17/02, pp 8-10). The Hospital asserted that the voluntary stipulation of dismissal of Dr. Douglass was *res judicata* and that with his dismissal, the vicarious liability

claim against the Hospital was also dismissed (Apx pp 57aa-59aa: Tr. 4/17/02, pp 8-10).

Plaintiff was not given time to prepare a written response to the summary disposition motion. Mr. Kenney orally responded that here, as in *Larkin v Otsego Memorial Hosp Ass'n*, 207 Mich App 391 (1994) lv den 450 Mich 866 (1995), there was always the intent to proceed against the Hospital (Apx pp 59aa-65aa: Tr. 4/17/02, pp 10-16). Mr. Kenney added that it was absolutely clear, based not only on his statements preceding the signing and entry of the dismissal, but also based on the statements in open court, that "at no time did we intend to have a dismissal of Doctor Douglass act as *res judicata* or a dismissal of the principal" (Apx pp 59aa-62aa: Tr. 4/17/02, pp 10-13).

Plaintiffs alternatively requested that the Court "on just terms" grant relief, calling "what happened here. . . **sandbagging of the . . . lowest order**" (Apx pg 62aa: Tr. 4/17/02, p 13; emphasis added). Citing to the MCR 2.612(C)(1)(a), provision for "mistake, inadvertence, surprise, or excusable neglect," he argued that the dismissal failed for lack of intent or meeting of the minds (Apx 62aa: Tr. 4/17/02, p 13). Plaintiffs also asked the trial court to amend the Order to reflect a dismissal of Dr. Douglass without prejudice (Apx pg 65aa: Tr. 4/17/02, p 16). Mr. Kenney asserted that, under the principles set forth in *Larkin,* the agreement to dismiss Douglass is a covenant not to sue (Apx pg 73aa: Tr. 4/17/02, p 24). Later Mr. Kenney reiterated that:

> **"It's clear what I wanted to do is enter into a covenant not to sue. That was clear.**
>
> I did understand. All we're talking about is whether the language – what the language of the order is. What the clear intent was to enter into a dismissal of Doctor Douglass such that I would still be allowed to proceed against the hospital." (Apx pp 75aa-76aa: Tr. 4/17/02, pp 26-27; emphasis added).

Judge Kelly then suggested that Plaintiffs' counsel had made a mistake of law from which

there was no relief because the agreement did not include the Hospital (Apx pg 78aa: Tr. 4/17/02, pp 29-30). Mr. Kenney responded that there was no mistake of law because the agreement was squarely within the law set forth in *Larkin* (Apx pp 80aa-81aa: Tr. 4/17/02, pp 31-32). Judge Kelly then stated:

> "I understood what your intent was. I don't know that there was on the record an affirmation or agreement by the parties that would be bound by that interpretation. That's kind of what I was hoping we would find somewhere on that transcript, the hospital to say, yes, we understand that and we expect that he will be entitled to proceed against us. That's absent." (Apx pg 81aa: Tr. 4/17/02, p 32).

Mr. Kenney then pointed out that there was no reason for him to pursue an express affirmation by Mr. Valitutti because the court indicated that it was not necessary by saying, "**I think they understand, I understand it, and I think everybody understands it**." (Apx pp 81aa-82aa: Tr. 4/17/02, pp 32-33).

Judge Kelly adjourned the hearing to review the cases and arguments. (Apx pg 83aa: Tr. 4/17/02, p 34). When he reconvened court an hour later, Mr. Kenney (not Mr. Valitutti as erroneously indicated by the court reporter) asked the judge to be given time to file a written brief, which the judge denied (Apx pp 83aa-84aa: Tr. 4/17/02, pp 34-35). Judge Kelly then ruled that further proceedings are barred by operation of law:

> "The decision to dismiss Doctor Douglass with prejudice is res judicata as to any claim for vicarious liability against River District Hospital. The law is well settled on that point. Further, there is no credible evidence that the dismissal was understood by the Doctor to be merely a covenant not to sue. **At the same time, the record is also very clear that counsel for Plaintiff never intended to waive his right to pursue his vicarious liability claims against River District Hospital. Unfortunately for Plaintiffs, it has had that legal effect.**
>
> Plaintiff's counsel repeatedly acknowledged that the dismissal was to be with prejudice. Nowhere did River District Hospital agree to waive its legal defense

of res judicata. Additionally while subsection (c)(1)(f) offers broad leeway when extraordinary circumstances demand vacating orders to achieve justice, it has never been interpreted to be designed to relief counsel of ill-advised or careless decisions. Also, it is normally a provision that is only invoked and available where other remedies under that court rule are not provided.

It's my preference that the case proceed and to be decided on the merits, but I believe that the operation of law precludes that. The motion must be granted." (Apx pp 84aa-85aa: Tr. 4/17/02, pp 35-36).

Before trial could proceed against the sole remaining Defendant, Henry Ford Hospital, the parties orally agreed to settle (Apx pg 86aa: Tr. 4/17/02, p 43). The jury was dismissed (Apx pg 92aa: Tr. 4/17/02, p 43). A non-final order dismissing River District Hospital was entered on May 3, 2002 (Apx pg 5a: Order).

Since the dismissal of Henry Ford Hospital had not yet been entered and the orders regarding Douglass and River District Hospital were not "final," Plaintiffs moved timely under MCR 2.604(A) and asked the trial court to revise the interim orders before entry of final judgment. Plaintiffs' motion for relief with respect to both the Douglass Order and the River District Hospital Order was brought under the provisions of MCR 2.612(C)(1) and (3). At the May 13, 2002 hearing, Plaintiff asserted that Defendants' conduct on April 16, 2002 in appointing Ms. Garrett as co-counsel and Dr. Douglass as the Hospital's corporate representative at the trial, coupled with the applicable caselaw, established that the trial court "was misled in terms of the effect and the nature of what was going on here" (Apx pp 130aa-131aa: Tr. 5/13/02, pp 6-7). On May 16, 2002, Judge Kelly denied the motion (Apx pp 6a-7a: Order). Following the May 28, 2002 entry of the order dismissing Henry Ford Hospital (Apx pp 2b-5b), the orders regarding Douglass and River District Hospital became final, and Plaintiffs filed their timely Claim of Appeal.

C. The Court Of Appeals Ruling.

On June 1, 2003, the Court of Appeals reversed in an unpublished opinion (Apx pg 8a). Judge Hilda Gage, with Judge Kirsten Frank Kelly concurring, granted relief from judgment under MCR 2.612 (Apx pp 8a-18a).

In her lead opinion, Judge Gage recognized that the mistake or misconception by Plaintiffs' counsel "was wholly contributed to and encouraged by defendants' counsel" (Apx pg 14a: Gage Opinion p 7). Judge Gage found that both defense counsel had a duty of disclosure "in light of the remarks made by plaintiffs' counsel and the trial court," and that both defense counsel knew that Plaintiffs' intentions were to proceed to trial against the Hospital (Apx pg 14a). Thus, Judge Gage's lead opinion rejected the Hospital's assertion that Plaintiffs' counsel's actions were wholly unilateral. Judge Gage concluded that "parties should be able to rely on oral stipulations made on the record in open court" and held that the written stipulation did not reflect what was agreed to by the parties (Apx pg 13a). Saying that justice would not be done unless the stipulation was set aside, Judge Gage explained, "[t]o deny plaintiffs a trial under this scenario would be an injustice" because "at the end of the day, those rules, as well as the spirit of the law must be applied in such a manner as to keep justice alive." (Apx pg 15a: Gage Opinion p 8).

In her concurrence, Judge Kelly found that the trial judge abused his discretion by refusing to set aside the stipulation and refusing to grant relief from judgment (Apx pp 16a-18a, Kelly concurring). Judge Kelly said the statements made in open court "were overt and unambiguous statements of plaintiffs' counsel's intent and the substance of the parties' agreement," and "not, as the dissent opines, plaintiffs' counsel's '*unilateral* understanding of the intent of the order'" (Apx pg 17a: Kelly concurring, emphasis in original). Judge Kelly said that, standing alone, "the trial

court's denial of plaintiffs' motion despite the previous day's discourse on the record was an abuse of discretion." (Apx pg 18a: Kelly concurring). Judge Christopher Murray dissented (Apx pp 19a-25a).

Both Defendants filed timely motions for rehearing which were denied (Apx pg 26a). Defendants then filed separate leave applications. Plaintiffs filed a combined response.

D. The Supreme Court Proceedings.

On July 8, 2005, this Court, pursuant to MCR 7.302(G)(1) ordered argument on the applications with the parties to address, inter alia: "(1) whether the doctrine of res judicata applies to the stipulated order dismissing the suit against G. Phillip Douglass, and (2) whether the trial court abused its discretion in failing to grant plaintiff's motion for relief from judgment or its motion for reconsideration" (Apx pp 27a-28a). As permitted by the Order, Plaintiffs filed a supplemental brief pointing out that under the express language of MCL 600.2925d, as amended, the release of an agent does not release the principal.

Oral argument on the applications was held on December 15, 2005. At the argument, the Court focused on whether the express language of the 1995 amendment to MCL 600.2925d abrogated the common law rule that, the release of an agent releases the principal. Plaintiffs' counsel acknowledged to the Court that under a proper interpretation and effectuation of the language of the 2925d amendment as an abrogation of common law rule, Dr. Douglass can be released on remand, and the trial would proceed against the Hospital.

On January 27, 2006, the Court granted leave and directed the parties to include among the issues briefed "the impact, if any, of the 1995 amendment of MCL 600.2925d on the current viability of *Theophelis v Lansing Gen Hosp*, 430 Mich 473 (1988) (Apx pp 29a-30a).

For the reasons that follow, this Court should affirm the decision of the Court of Appeals remanding the case for trial at the St. Clair Circuit Court.

Law And Argument

Counterstatement Of The Standard Of Review

The trial court granted summary disposition to River District Hospital saying that the claim against the Hospital was barred because of release of Dr. Douglass under MCR 2.116(C)(7). Appellate courts review de novo the trial court's ruling on summary disposition asserting that a claim is barred and that the moving party is entitled to judgment as a matter of law. *Stoudemire v Stoudemire*, 248 Mich App 325, 332 (2001). The trial court's subsequent refusal to grant relief from judgment is ordinarily reviewed for an abuse of discretion, *Driver v Hanley (After Remand)*, 226 Mich App 558, 564-565 (1997).

At the Court of Appeals, Judge Gage reversed based on an erroneous grant of summary disposition, while Judge Kelly found that the trial judge abused his discretion when he denied Plaintiffs' motion for relief from the judgment of summary disposition. Plaintiffs submit that where, as here, the decision to grant the summary judgment in the first instance is found to be erroneous, appellate review should be de novo, and not under the far more deferential abuse of discretion standard.

Moreover, before the December 15, 2005 arguments on the applications, Plaintiffs raised the applicability of the 1995 amendment of MCL 600.2925d, and this Court's leave grant Order directed the parties to address that issue (Apx pg 30a). At the arguments on the application, Justice Corrigan inquired whether the statute might be deemed waived by the fact it was first raised on

appeal. This Court has long held that an issue that is necessary to the proper determination of a case is properly before the Supreme Court. *Ludington Serv Corp v Acting Commr of Ins*, 941 Mich 481, 503 (1994); *Dation v Ford Motor Co*, 314 Mich 152, 160-161 (1946). The present case concerns the legal issue of the applicability of the statute and the facts were fully developed at the trial court. See *Sutton v City of Oak Park*, 251 Mich App 345 (2002). Further, statutory interpretation and the applicability of a statute presents a question of law that is likewise subject to de novo review by this Court. *Adams Outdoor Advertising, Inc v City of Holland*, 463 Mich 675, 681 (2001); *Alex v Wildfong*, 461 Mich 10, 21 (1999).

I. The Unqualified Words Of MCL 600.2925d Make It Absolutely Clear That The Legislature's 1995 Amendment Of That Statute Abrogated The Common Law Rule That The Release Of The Active Tortfeasor Also Dismisses The Passive Tortfeasor, Thereby Overruling *Theophelis v Lansing Gen Hosp*, 430 Mich 473 (1987).

Defendants assert that *Theophelis v Lansing Gen Hosp*, 430 Mich 473 (1987) requires this Court to affirm the trial court because *Theophelis*, construed MCL 600.2925d to continue the common law rule that "a valid release of an agent for tortious conduct operates to bar recovery against the principal on a theory of vicarious liability ..." *Id.* at 480, 493. In fact, as a matter of statutory construction, MCL 600.2925d plainly does not continue this common law rule.

Statutory interpretation is a question of law. *People v Schaeffer*, 473 Mich 418 (2005). When interpreting a statute, it is the court's duty to give effect to the intent of the Legislature as expressed in the actual language used in the statute. *Halloran v Bhan*, 470 Mich 572, 576 (2004). It is the role of the judiciary to interpret, not write, the law. *Koontz v Ameritech Services, Inc*, 466 Mich 304, 312 (2002). If statutory language is clear and unambiguous, the statute is enforced as written. *People v Laney*, 470 Mich 267, 271 (2004). Judicial construction is neither necessary nor

permitted because it is presumed that the Legislature intended the clear meaning it expressed. *Roberts v Mecosta Co Gen Hosp*, 466 Mich 57, 63 (2002).

While the cardinal rule of statutory interpretation is to give effect to the intent of the Legislature, that intent must be ascertained from the actual text of the statute, not from extra-textual judicial divinations of "what the Legislature really meant." *Mayor of Lansing v Mich PSC*, 470 Mich 154, 164 (2004). "Rather than engaging in legislative mind-reading to discern [legislative intent], ... the best measure of the Legislature's intent is simply the words that it has chosen to enact into law." *Id.*

As to the effect of a release, covenant not to sue or covenant not to enforce judgment, MCL 600.2925d as amended in 1995 provides in relevant part:

> **"§600.2925d. Effect of release, covenant not to sue, or covenant not to enforce judgment.**
>
> **Sec.2925d. If a release or a covenant not to sue or not to enforce judgment is given in good faith to 1 of 2 or more persons for the same injury or the same wrongful death, both of the following apply:**
> **(a) The release or covenant does not discharge 1 or more of the other persons from liability for the injury or wrongful death unless its terms so provide.**

From the unqualified words of §2925d(a), it is absolutely clear that the Legislature intended no exception to its general rule of nondischarge of other persons from liability absent specific language in the release or covenant not to sue specifically providing for such discharge. The plain meaning of the statute does not contemplate the continuation of the common law rule that the settlement with the active tortfeasor also dismisses the passive tortfeasor.

It is true that statutes in derogation of the common law must be strictly construed, and will not be extended by implication to abrogate established rules of common law. The statute, however, must be construed sensibly and in harmony with the legislative purpose. *Rusinek v Schultz, Snyder*

& Steele Lumber Co, 411 Mich 502, 508 (1981).

This Court has already construed Michigan's contribution for joint tortfeasor's statute MCL 600.2925a which was enacted at the same time as MCL 600.2925d. Both statutes are based upon the Uniform Contribution Among Tortfeasors Act. See *Donajkowski v Alpena Power Company*, 460 Mich 243 (1999). In Justice Griffin's lead opinion in *Theophelis*, he focused upon the meaning of the word *"tortfeasors"* in §2925d which deleted the 1995 amendment. That amendment substituted *"the person"* for *"the tort-feasor"* and *"other person for the injury or wrongful death"* for *"other tortfeasor."* Justice Griffin concluded, wrongly Plaintiffs assert, that because the statute does not specifically include vicarious liability situations in its language, it "leav[es] in place the deep-rooted common law principle that the release of [the agent] would discharge his principal. Plaintiffs believe, with no disrespect intended to Justice Griffin, that the lead opinion in *Theophelis* engages in exactly the type of "legislative mind-reading" that this Court rejected in *Mayor of Lansing, supra*. The words the Legislature has chosen in promulgating §2925d are clear and the best measure of its intent is that the common law principal/agent exception was also abrogated by the express words of the statute.

The decisions of other jurisdictions and analysis of the Restatements demonstrate the clear trend toward refusing to give preclusive effect to benefit the principal when the agent is dismissed. Restatement (2d), Torts §885 provides in relevant part:

> **"(1) A valid release of one tortfeasor from liability for a harm, given by the injured person, does not discharge others liable for the same harm, unless it is agreed that it will discharge them.**
> **(2) A covenant not to sue one tortfeasor or not to proceed further against him does not discharge any other tortfeasor for the same harm."**

The Restatement(3d) of Torts (2000): Apportionment of Liability, §24 Definition and Effect of

Settlement Reported Notes, Comment b History, remarks that "The one-settlement-releases-all rule may be the most widely and harshly criticized legal rule of all time" (citations omitted). Section 24(b) unequivocably resolves the controversy:

> **"(b) Persons released from liability by the terms of a settlement are relieved of further liability to the claimant for the injuries or claims covered by the agreement, but the agreement does not discharge any other person from liability."**

In *JFK Medical Center, Inc v Price*, 647 So 2d 833 (Fla 1994), the Florida Supreme Court, on facts similar to this case, held that the voluntary dismissal with prejudice of the physician active tortfeasor, did not dismiss the passive tortfeasor medical center because it was not equivalent to an adjudication on the merits. The Florida Supreme Court first quoted the Restatement (Second) of Judgments, §51 (1982) entitled "Persons Having a Relationship in Which One Is Vicariously Responsible for the Conduct of the Other" which provides in relevant part:

> **"If two persons have a relationship such that one of them if vicariously responsible for the conduct of another, and an action is brought by the injured person against one of them, the judgment in the action has the following preclusive effects against the injured person in a subsequent action against the other.**
>
> * * *
>
> **(4) A judgment by consent for or against the injured person does not extinguish his claim against the person not sued in the first action ... ."**

The comments to subsection (4) state:

> *"f. Judgment by consent (Subsection (4)).* The settlement of a claim against one of several obligors generally does not result in the discharge of others liable for the obligation. This rule applies when the obligation is reduced to judgment, see § 50, and even though the liability of one obligor is derivative from another under principles of vicarious responsibility. Moreover, a judgment by consent, though it terminates the claim to which it refers, is not an actual adjudication. See § 27, Comment *e*. The considerations that lead to denying issue preclusive effect to consent judgments, chiefly the encouragement of settlements, are applicable when an injured person has claims against more than one person for the same wrongful act. It is therefore appropriate to regard the claim against the primary obligor and

the person vicariously responsible for his conduct as separate claims when one of them has been settled. Any payment received by the injured person in such a settlement, however, discharges pro tanto the obligation of the other obligor to pay the loss." See § 50(2).

Further, citing to Fla Stat 768.31(5), the Court said that Florida's public policy under that statute would be compromised if it ruled otherwise.[3] The Florida Supreme Court reasoned that settlements would be encouraged by abolishing the common law rule that a discharge of one joint tortfeasor discharges all tortfeasors. Therefore, voluntary dismissal of the active tortfeasor, with prejudice, under the circumstances presented is not the equivalent of an adjudication on the merits, and such a dismissal will not bar continued litigation against the passive tortfeasor. 647 So2d at 834.

The West Virginia Supreme Court of Appeals reached a similar result in *Woodrum v Johnson*, 559 SE2d 908, 909 (WVa 2001) concluding that "a plaintiff's release of a primarily liable defendant should not be permitted to have the potentially unintended effect of releasing other liable parties." The Woodrums settled with the physician and reserved their right to proceed against the hospital on a vicarious liability theory. The Court recognized "broad and diverse disagreement among courts" on the issue and collected cases and annotations. The opinion listed nine

---

[3] The Florida statute is essentially identical to MCL 600.2925d, and provides in relevant part:

(5) RELEASE OR COVENANT NOT TO SUE.-When a release or a covenant not to sue or not to enforce judgment is given in good faith to one of two or more persons liable in tort for the same injury or the same wrongful death:

* * *

(a) It does not discharge any of the other tortfeasors from liability for the injury or wrongful death unless its terms so provide, but it reduces the claim against the others to the extent of any amount stipulated by the release or the covenant, or in the amount of the consideration paid for it, whichever is the greater ....

jurisdictions whose highest court by way of statute or common law, "have rejected the proposition that the release of, or covenant not to sue, a primarily liable defendant extinguishes a plaintiff's right to obtain a judgment against a party that is derivatively liable." 559 SE2d at 913, n 10. The Court cited three jurisdictions, including Michigan's *Theophelis* decision, which give preclusive effect only to releases. *Id.*[4] Based on three considerations, the *Woodrum* Court concluded first that:

> "[P]ermitting plaintiffs to enter into partial settlements with primarily liable parties without requiring them to necessarily forsake their right to pursue further action against parties whose liability is vicarious or derivative, encourages settlement in those instances where countervailing claims for indemnity are unlikely, thus permitting a negligent agent or employee who is without substantial financial resources to buy his or her peace. In virtually every other conceivable circumstance, the converse rule would be just as likely to obstruct settlement as it would be to promote it. This is particularly true because "at least some injured parties 'would be reluctant to settle with the servant or agent, and thereby extinguish his [or her] cause of action against the master or principal, unless he [or she] could settle with the servant or agent for' for full satisfaction (in which case the effect of the common law rule would be irrelevant)." 559 SE2d at 917-918.

The Court also reasoned that, practically:

> "[I]t may not always be possible for a settling plaintiff to determine at the time of partial settlement whether his or her claims against other non-settling defendants rest upon actionable conduct on the part of such defendants, or vicarious liability. It is easily conceivable that a plaintiff could release a primarily liable defendant at an early state of the litigation without obtaining full satisfaction for the underlying claim, on the assumption that the remaining defendants are directly liable, only to find out at a later point that the viability of his or her action against the non-settling defendants rests entirely upon theories of vicarious liability. 559 SE2d at 918.

Most significantly, pointing to the Indiana Supreme Court decision in *Pelo v Franklin College of Indiana*, 715 NE2d 365, 366 (Ind 1999), the West Virginia Supreme Court, stating that

---

[4] The same note listed eight state supreme court and three other intermediate state appellate decisions holding that plaintiff's right to pursue the principal is extinguished.

such a preclusive rule "would result in the creation of a perilous danger to the unwary plaintiff, a circumstance that most citizens would find both mystifying and untenable," spoke rather directly about the possibility of a situation similar to the one actually confronted by Plaintiffs here:

> "We agree with the Indiana Supreme Court that the rule advocated by the Hospital in this case, which would ignore the express intention of the parties to the settlement, sets a trap for those litigants who are unaware of the exception for cases based on derivative liability, notwithstanding the general rule ... that a release will operate as the parties intended. The law is not a game where the litigant with the lawyer who happens to know all the traps wins. To the extent possible rules of law should produce results consistent with the expectations of ordinary citizens. Surely most people, like the [plaintiffs], would be surprised to discover that the [plaintiffs'] release did not mean what it said when it purported to preserve their claim against [the derivatively liable defendant]. Accordingly, when parties sign an agreement releasing one defendant with the clearly expressed expectation that they will be able to proceed against others, that expectation should be given effect by the courts." 559 SE2d at 918.

Based on these authorities, and the clear language of §2925d, this Court should affirm the holding of the Court of Appeals and remand to the trial court where, if Defendants are willing, Plaintiffs will effectuate what they intended, and what Defendants and the trial court knew they intended, on April 16, 2002, a dismissal of Dr. Douglass and a trial with their day in Court against the Hospital.

II. If *Theophelis* Remains Good Law, The Court Of Appeals Nonetheless Correctly Found That The Hospital Was Not Entitled To Summary Disposition Because The Trial Court Erred At Law In Failing To Effectuate The Undisputed Intent Of Plaintiffs' Counsel As Clearly Understood By Both The Trial Court And Defense Counsel; Moreover, The Trial Court Abused Its Discretion By Entering, And Then Refusing To Vacate, The Judgment Based On MCR 2.612.

Court of Appeals Judges Hilda Gage and Kirsten Frank Kelly properly agreed that Plaintiffs were entitled to relief from the judgment of dismissal because the written order entered in the circuit court did not accurately reflect the parties' oral agreement made in open court. Judge Gage specifically recognized that "parties should be able to rely on oral stipulations made on the record

in open court," and correctly held that the written stipulation did not reflect what was agreed to by the parties, therefore Plaintiffs were entitled to relief from judgment and vacation of the stipulation and order (Apx pp 13a-15a). Court of Appeals Judge Kelly correctly held that the trial judge abused his discretion by refusing to set aside the stipulation and refusing to grant relief from judgment (Apx pp 16a-18a). Even Judge Murray's dissent agreed that the majority opinion was "from an equity standpoint, difficult to resist" (Apx pg 19a). In short, the Court of Appeals "got it right" and, in doing so, corrected a clear error that perpetrated the substantial injustice of denying Plaintiffs a trial on the merits against River District Hospital.

The Hospital asserts that the dismissal of Dr. Douglass operates as res judicata, but there is absolutely no reason to hold that doctrine applicable here. While Michigan has adopted a broad approach to the application of res judicata "is not a constitutional mandate that must be carefully construed to maintain its integrity, but only a tool created by the courts." *Pierson Sand and Gravel, Inc v Keeler Brass Company*, 460 Mich 380-382, n 10 (1999). Moreover, "the goal of res judicata is to promote fairness, not lighten the loads of the state court by precluding suits whenever possible." *Id* at 383. "The doctrine of res judicata was judicially created in order to 'relieve parties of the cost and vexation of multiple lawsuits, conserve judicial resources, and, by preventing inconsistent decisions, encourage reliance on adjudication.'" *Hackley v Hackley*, 426 Mich 582, 584 (1986), quoting *Allen v McCurry*, 449 US 90, 94; 101 S Ct 411; 66 L Ed 2d 308 (1988). None of these salutary purposes for the doctrine of res judicata would be served by its application to this case.

A. The Improper Grant Of Summary Disposition Was Properly Set Aside Pursuant To MCR 2.612.

Judges Gage and Kelly at the Court of Appeals independently focused on subsections of MCR 2.612(A)and (C) to relieve Plaintiffs from the erroneous order granting summary disposition. Those subsections provide in relevant part:

> **(A) Clerical Mistakes.**
>
> (1) Clerical mistakes in judgments, orders, or other parts of the record and errors arising form oversight or omission may be corrected by the court at any time on its own initiative or on motion of a party and after notice, if the court orders it.
>
> * * *
>
> **(C) Grounds for Relief From Judgment.**
>
> (1) On motion and on just terms, the court may relieve a party or the legal representative of a party from a final judgment, order, or proceeding on the following grounds:
>
> (a) Mistake, inadvertence, surprise, or excusable neglect.
>
> * * *
>
> (c) Fraud (intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party.
>
> * * *
>
> (f) Any other reason justifying relief from the operation of the judgment.
>
> * * *
>
> (3) This subrule does not limit the power of a court ... to set aside a judgment for fraud on the court."

MCR 2.612 provides a series of grounds for relief from judgment where compelling circumstances require such relief in order to avoid serious injustice. The majority at the Court of Appeals recognized that the trial court had to be reversed here to avoid serious injustice with Judge Gage finding elements of mistake, fraud, or unconscionable advantage and Judge Kelly reaching the same conclusion by finding a clerical error because the trial court's order failed to accurately reflect what occurred on the record. The majority's opinion, whether characterized as a reversal of summary disposition or as relief from judgment, was correct and should be affirmed.

B. The Decision By The Court Of Appeals Is Well Supported On The Basis Of Mistake, Fraud And Grounds Of Equity.

While unwilling to declare defense counsel's conduct a conspiracy, Judge Gage found it would be unjust to deny Plaintiffs a trial under the scenario presented. The ruling is correct. The individual elements leading Judge Gage to this conclusion are summarized here.

1. The Court Of Appeals Correctly Granted Relief Based On Mistake.

Relief from a judgment or order is clearly called for if the mistake or neglect is by the moving party, opposing parties, those of counsel, or in what is actually done or decided by the Court. Dean & Longhofer, Michigan Court Rules Practice, Text §2612.10, pp 474-475. To be sure, the mistake must not be due to the party or his attorney's own carelessness, ignorance of the rules or a faulty procedural decision in the case. But, that is not what happened here. In this case, Plaintiffs were deceived by Defendants into an agreement which the trial court mistakenly construed as barring the continuation of the case against the Hospital.

With respect to mistake, Restatement (2d) Judgments §71 provides in relevant part:

"§ 71 Judgment Based on Mistake

Subject to the limitations stated in § 74, a judgment rendered in a contested action may be avoided if the judgment resulted from a mistake of law or fact and:
(1) During to the course of the action the party seeking relief had made a reasonable effort to ascertain the matter with respect to which the mistake was made, and

(2) The mistake:

(a) Consisted of a failure to express the judgment of the court; or

(b) Was such that allowing its correction by relief from the judgment will obviate an appeal in which the mistake is certain to result in reversal, or will similarly expedite ultimate decision in the action; or

Comment (d) further explains:

> *d. Due diligence (Subsection (1).* The requirements concerning due diligence with regard to relief based on mistake are essentially similar to those applicable to relief on the ground of fraud. See § 70, Comment *c*. The requirement that reasonable effort to ascertain the matter in question have been used during the course of the action is, in modern procedure, an insuperable barrier to relief except in very unusual cases. Modern discovery procedure affords virtually unlimited means of ascertaining facts that are not deliberately concealed. Failure to have ascertained matter that could have been uncovered by discovery procedure should preclude relief except when the failure is itself excusable. If the action is in a tribunal whose procedure does not provide for discovery, then the question is whether the opportunity for unofficial pretrial discovery and for discovery at trial had been exploited with reasonable vigor."

The trial court, in its April 17, 2002 ruling, focused on what it characterized as Plaintiffs' mistake of law. The court then cited the general rule that a mistake of law, rather than mistake of fact, is not subject to correction by the court. The trial court ignored the exceptions.

Judge Gage found that this case presented the kind of mistake of law that courts are bound to correct. It is settled law that where a mistake of one party at the time the contract was made as to a basic assumption on which he made the contract has a material effect on the agreed exchange of performances that is adverse to him, the contract is voidable by him if he does not bear the risk of the mistake, and (a) the effect of the mistake is such that enforcement of the contract would be unconscionable, or (b) the other party had reason to know of the mistake or his fault caused the mistake. In *Carpenter v Detroit Forging Co*, 191 Mich 45, 53-54 (1916), this Court stated that:

> "Whether placed upon the ground of constructive fraud or mistake of fact as well as of law, **the law forbids that a party who, with full knowledge of the ignorance of the other contracting party, has not only encouraged that ignorance, but has knowingly deceived and led that other into a mistaken conception of his legal rights, should shield himself behind the doctrine that a mere mistake of law affords no grounds for relief."** (emphasis added).

Similarly, in *Renard v Clink*, 91 Mich 1, 3-4 (1892), the Court said:

> "While it is a general rule that equity will not relieve against a mistake of law, this rule is not universal.

* * *

> "[W]here a person is ignorant or mistaken with respect to his own antecedent and existing private legal rights, interests, or estates, and enters into some transaction, the legal scope and operation of which he correctly apprehends and understands for the purpose of affecting such assumed rights, interests, or estates, **equity will grant its relief, defensive or affirmative, treating the mistake as analogous to, if not identical with, a mistake of fact."** (emphasis added).

More recently, in *Komraus Plumbing v Cadillac Sands Motel, Inc*, 387 Mich 285, 290 (1972), the Court cited *Renard* with approval, adding that the general rule does not apply where the neglect is due to some "stratagem, trick, or artifice on the part of the one seeking to enforce the contract." Accord: *Stone v Stone*, 319 Mich 194, 198-199 (1947), also citing other cases. The rule set forth in *Carpenter* and *Renard* is embodied in the Restatement 2d, Contracts §153:

> **"When Mistake of One Party Makes a Contract Voidable.** Where a mistake of one party at the time a contract was made as to a basic assumption on which he made the contract has a material effect on the agreed exchange of performances that is adverse to him, the contract is voidable by him if he does not bear the risk of the mistake under the rule stated in § 154,[5] and
>
> (a) the effect of the mistake is such that enforcement of the contract would be unconscionable, or
>
> (b) the other party had reason to know of the mistake or his fault caused the mistake."

As the comments and illustrations to the rule explain, relief will be granted **where the other party actually knew or had reason to know of the mistake at the time the contract was made.** Comment "a" states that, "[t]he parol evidence rule does not preclude the use of prior or contemporaneous agreements or negotiations to establish that a party was mistaken. See: *Fisher v Stolaruk Corp*, 110 FRD 74, 76 (ED Mich 1986) [equity will provide affirmative relief by way of rescission where one party made a mistake as to the meaning of a contract and the mistake was

---

[5] The situations set forth in §154 do not apply to this case.

known to the other party]; *CN Monroe Mfg Co v United States*, 143 F Supp 449 (ED Mich 1956) [allowing restitution where plaintiff mistakenly underpriced his bid because defendant should have known of gross mistake].

Here, as Plaintiffs' counsel asserted on April 17, 2002, there was no "meeting of the minds" if the agreement is interpreted as Defendants assert to include dismissal of the Hospital. Under the circumstances presented, it is absolutely clear that both the attorney for Dr. Douglass and the attorney for the Hospital "had reason to know" of the "mistake." Counsel for Dr. Douglass who drafted the stipulation (obviously on the same word processor as the Hospital's summary disposition motion) must have the agreement construed against her client. The surrounding statements and circumstance which are admissible[6] clearly show that Plaintiffs would not have entered into an agreement where the direct effect was dismissal of the Hospital.

The lead opinion at the Court of Appeals recognized this, citing *Mate v Wolverine Mut Ins*, 233 Mich App 14 (2000), for the proposition that in the context of reformation, the law is established that an instrument can be reformed to reflect the parties' actual intent if there is clear evidence that both parties reached an agreement but that, as a result of mutual mistake or mistake on the part of one and fraud on the part of the other the instrument does not express the true intent of the parties" (Apx pg 13a).

Here for the reasons set forth in Judge Gage's and Judge Kirsten Frank Kelly's opinions, Plaintiffs exhibited all due diligence and the facts of this case establish the kind of mistake by the trial court in dismissing River District Hospital that our appellate courts are bound to correct. The

---

[6] *Rood v General Dynamics, Inc*, 444 Mich 107, 119 (1993):

"Look to expressed words of the parties and their visible acts".

Court of Appeals properly reversed the trial court.

2. The Court Of Appeals Correctly Granted Relief Based On Fraud, Misrepresentation Or Misconduct By Defendants That Was Tantamount To A Conspiracy.

MCR 2.612(C)(1)(c) provides for relief from judgment for fraud. A fraud is perpetrated on the court when some material fact is concealed from the court or when some material misrepresentation is made to the court. *Valentino v Oakland County Sheriff*, 134 Mich App 197, 207 (1984) affd in part 424 Mich 310 (1986); *DeHaan v DeHaan*, 348 Mich 199 (1957). Fraud may be consummated by **suppression of a material fact which results in a false impression.** *U.S. Fidelity & Guaranty Co v Black*, 412 Mich 99, 115 (1981). The fact suppressed must be one which the party is in good faith bound to disclose. *Groening v Opsata*, 323 Mich 73, 83 (1948). Where the particular circumstances impose a duty to speak, but the person deliberately remains silent, the silence is equivalent to a false representation. As this Court's recent decision in *Hord v Environmental Research Inst*, 463 Mich 399, 412-413 (2000) makes clear, "a legal duty to make a disclosure will arise most commonly in a situation where inquiries are made by the plaintiff, to which the defendant makes incomplete replies that are truthful in themselves but omit material information." Citing *Groening*, *supra* [buyer's inquiry regarding erosion of bluff on which house was situated] and Sullivan v Ulrich, 326 Mich 218, 227-230 (1949) [buyer's inquiry regarding termites].

Here, Mr. Kenney stated on the record exactly the intent of Plaintiffs' agreement: that Plaintiffs were dismissing Dr. Douglass, but not the claims against the Hospital. But, before he could ask the Hospital to confirm this agreement, the trial court, attempting to move matters along, interjected, **"I understand that, I am sure they do, too. Next."** (Apx pg 44a; emphasis added).

At this point, if the Hospital (or Dr. Douglass) disagreed with the trial court's statement of understanding regarding the scope and effect of the agreement, it was incumbent upon their attorneys to speak up. Their silence in the face of the trial court's statement was sandbagging of the worst kind. It amounted to the perpetration of a fraud on the court. Since the trial court stated the understanding of the parties - - the Defendants were required to advise the trial court of its error - - not use the Court's misunderstanding against the Plaintiffs immediately thereafter to obtain the dismissal of the Hospital.

Restatement (2d) Judgments §70 provides in part:

> **"§70 Judgment Procured by Corruption, Duress, or Fraud**
> (1) [A] judgment in a contested action may be avoided if the judgment:
>
> (a) Resulted from corruption of or duress upon the court or the attorney for the party against whom the judgment was rendered, or duress upon that party, or
>
> (b) Was based on a claim that the party obtaining the judgment knew to be fraudulent.
>
> (2) A party seeking relief under Subsection (1) must:
>
> (a) Have acted with due diligence in discovering the facts constituting the basis for relief;
>
> (b) Assert his claim for relief from the judgment with such particularity as to indicate it is well founded and prove the allegations by clear and convincing evidence; and ..."

Comment (c) states that while defining the circumstances under which the conclusiveness of a judgment can be overcome on account of fraud is "especially difficult," ... "the critical considerations usually are whether the claim of fraud is well substantiated and not merely asserted at large and whether in the original action the victim had pursued reasonable precautions against deception." Comment (d) lists four elements for obtaining relief:

> "First, it must be shown that the fabrication or concealment was a material basis for the judgment and was not merely cumulative or relevant only to a peripheral issue. Second, the party seeking relief must show that he adequately pursued means for discovering the truth available to him in the original action. *** Furthermore, in some situations a litigant is entitled to be passive and unquestioning with respect to the proofs of another party. Thus, the cases allowing relief from fraud practiced by a trustee often advert to the fact that a beneficiary should not have to anticipate a trustee's deliberate falsification of the accounts he presents to the court.
>
> Third, the applicant must show due diligence after judgment in that he discovered the fraud as soon as might reasonably have been expected. ***
>
> Finally, the party seeking relief must demonstrate, before being allowed to present his case, that he has a substantial case to present, and must offer and convincing proof to establish that the evidence underlying the judgment was indeed fabricated or concealed."

The Court of Appeals implicitly found here that all four of these elements were satisfied. The concealment here in open court went to the heart of the claim against the Hospital. Plaintiffs' counsel was diligent in attempting to discover the truth, but the trial judge, eager to move forward, interposed and assured Mr. Kenney that Defendants understood the effect of the stipulation. The Hospital's attorney who signed the stipulation had a duty as an officer of the court to speak up and apprise the court and Plaintiffs that the Hospital would not agree to the release of its agent without expecting that the Hospital itself would be released as well. Plaintiffs moved for relief from judgment immediately. Clearly, Plaintiffs had a substantial case to present.

Under any standard of review, the Court of Appeals recognized the wholly unjust effect of the trial court's ruling. This Court should deny Defendants any relief from the honorable and just ruling by the Court of Appeals.

The Court of Appeals did not specifically discuss it, but the trial court decision also ignored extrinsic fraud. "Extrinsic fraud" is fraud which actually prevents the losing party from having an adversary trial on a significant issue. *Stallworth v Hazel*, 167 Mich App 345, 355 (1988); *Rogoski*

v City of Muskegon, 107 Mich App 730, 736 (1981). *Theophelis v Lansing Gen Hosp*, 430 Mich 473, 493 (1988), recognizes that a clear and convincing showing of fraud that induced a unilateral mistake is grounds for rescission of an agreement. See also: *Windham v Norris*, 370 Mich 188, 193 (1963); *Groesbeck v Bennett*, 109 Mich 65 (1896).

Moreover, it is a bedrock tenet of our profession that lawyers owe a duty of candor and fairness in their dealings with judges and opposing counsel. That duty was breached here when Defendants stood silently before the trial court while Mr. Kenney described the scope of Plaintiffs' dismissal of Dr. Douglass as definitely not including dismissal of the Hospital. When attorneys breach their professional responsibility of candor and fairness, courts must not hesitate to intervene.

Thus, in *Virzi v Grand Trunk Warehouse*, 571 F. Supp 507 (E.D. Mich 1983), Judge Horace Gilmore vacated a settlement in a personal injury case where plaintiff's counsel failed to advise defense counsel or the court that plaintiff, who was expected to be a good witness, had died from causes unrelated to the lawsuit in the period between the mediation award and the placing of the settlement on the record. The judge vacated the settlement even though defense counsel never asked plaintiff's attorney if plaintiff was still alive and available for trial. The court rejected the argument that plaintiff's counsel had no duty to volunteer the information. Judge Gilmore cited Rule 3.3(a)(2) of the Model Rules of Professional Conduct which has subsequently been adopted verbatim as MRPC 3.3(a)(2):

> "A lawyer shall not knowingly fail to disclose a material fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client."

Quoting Judge Rubin's law review article "A Causerie on Lawyer's Ethics in Negotiations," 35 LaLRev 577 (1975), Judge Gilmore observed,

> "'Another lawyer. . . who deals with a lawyer should not need to exercise the same

degree of caution that he would if trading for reputedly antique copper jugs in an oriental bazaar.

* * *

The distinction between honesty and good faith need not be finely drawn here; all lawyers know that good faith requires conduct beyond simple honesty.'"

As Judge Gilmore further explained:

"There is no question that plaintiff's attorney owed a duty of candor to this Court, and such duty required a disclosure of the fact of the death of the client. Although it presents a more difficult judgment call, this Court is of the opinion that the same duty of candor and fairness required a disclosure to opposing counsel. . .

* * *

Opposing counsel does not have to deal with his adversary as he would deal in the marketplace. Standards of ethics require greater honesty, greater candor, and greater disclosure. . .

The handling of a lawsuit and its progress is not a game. There is an absolute duty of candor and fairness on the part of counsel to both the Court and opposing counsel." 571 F.Supp at 512.

See also: *Spaulding v Zimmerman*, 116 NW2d 704, 709 (Minn 1962) [reversing settlement where defense counsel failed to disclose Plaintiff's aortic aneurysm found by their physician which had escaped notice of plaintiff's physicians].[7]

---

[7] In *Spaulding*, the Court said,

"To hold that the concealment was not of such character as to result in a nonconscionable advantage over plaintiff's ignorance or mistake, would be to penalize innocence and incompetence and reward less than full performance of an officer of the Court's duty to make full disclosure to the Court . . ."]

Likewise, in *Hamilton v Nationwide Insurance Co*, 404 SE2d 540 (W Va 1991), the West Virginia Supreme Court rescinded a state court settlement for plaintiff after it was discovered that plaintiff's counsel had accepted it as soon as he learned (but, before defense counsel knew) that in a separate declaratory action, the federal court had granted summary judgment on the issue of coverage for Nationwide's insured's actions. The Court said that even though it was not technically conditioned on the outcome of the federal action, the settlement agreement was unenforceable due to failure of consideration because "Nationwide's primary incentive for offering the $100,000 cash settlement was the unknown outcome of the declaratory judgment action." After citing West Virginia's identical counterpart to MRPC 3.3(a) and its commentary that "[m]aking a false statement includes the failure to make a statement in circumstances in

Likewise, our Court of Appeals has properly refused such harboring of error until plaintiffs could no longer correct it. In *Matley v Matley* (On Rem), 242 Mich App 100, 101-102 (2000), the Court implied that it is a fraud upon the court to conceal material facts from the court and the opposing party. Here, neither Plaintiffs nor the trial court knew what both Defendant Hospital and Defendant Douglass knew - - that the Hospital intended to use the dismissal with prejudice of Dr. Douglass as a bar to Plaintiffs proceeding against the Hospital. This was a fraud on the court. The Court of Appeals correctly vacated the Order dismissing the Hospital.

3. Equity Compelled The Court of Appeals To Vacate The Order Dismissing River District Hospital.

MCR 2.612(C)(1)(f) permits relief from judgment or order where extraordinary circumstances exist. In *Stallworth v Hazel*, 167 Mich App 345, 357 (1988), the Court stated that Michigan has adopted the federal criteria for application of this provision:

> "In general, relief has been granted under this provision where the judgment was obtained by the improper conduct of the party in whose favor it was rendered, or resulted from the excusable default of the party against whom it was directed, *under circumstances not covered by clauses (1) through (5)* and where the substantial rights of other parties in the matter in controversy were not affected. (Emphasis in original, *Id.*).

More recently, in *Heugel v Heugel*, 237 Mich App 471, 481 (1999), the Court of Appeals explained that this rule provides the trial court with "'a grand reservoir of equitable power to do

---

which nondisclosure is equivalent to making such a statement," the Court added:

> "While we do not dispose of this case on grounds of misrepresentation or fraud, we take a particularly dim view of Hamilton's attorney's failure to disclose his knowledge regarding the action taken by the federal court. The preferred course of action for the Hamilton's counsel, in our opinion, would have required him to voluntarily disclose the information to Nationwide in the spirit of encouraging truthfulness among counsel and avoiding the consequences of failure to disclose, *e.g.*, this appeal." 404 S.E.2d at 542, n 3.

justice in a particular case' and 'vests power in courts adequate to enable them to vacate judgments whenever such actions is appropriate to accomplish justice.'" In *Heugel*, the Court held that the trial court did not abuse its discretion in finding that extraordinary circumstances existed that mandated partially setting aside the judgment of divorce. The *Heugel* Court confirmed that for relief to be granted under this rule, three requirements must be satisfied:

> "(1) the reason for setting aside the judgment must not fall under subsections a through e, (2) the substantial rights of the opposing party must not be detrimentally affected if the judgment is set aside, and (3) extraordinary circumstances must exist that mandate setting aside the judgment in order to achieve justice." 237 Mich App at 478-479.

The Court went on to explain that this subsection provides grounds for relief even if one or more of the other bases in MCR 2.612(C) are present when additional factors are present that persuade the court that injustice will result if the judgment is allowed to stand. The Court also rejected claims that the appellant's substantial rights were detrimentally affected because he was not permitted to enforce an unconscionable agreement and the argument that the motion was untimely because it was filed two and one-half months after appellant had filed his motion to enforce the judgment. In a related context, the Court of Appeals also reminded that it is well-settled that:

> "Dismissal is a drastic step that should be undertaken cautiously. Before imposing such a sanction, the trial court is required to carefully evaluate all available options on the record and conclude that the sanction of dismissal is just and proper. *Brenner v Kolk*, 226 Mich. App. 149, 163; 573 N.W.2d 65 (1997)."[8]

---

[8] Compare *Rulli v Fan Company*, 683 NE2d 337 (Ohio 1997), where the Ohio Supreme Court held that the trial court abused its discretion in ordering the enforcement of a disputed settlement agreement between brothers over the disposition of a business partnership. Although the parties placed the settlement on the record and affirmatively indicated that they understood its parameters and agreed to be bound by it, and the trial court filed a judgment entry as settled and dismissed, dispute soon arose over the meaning of the statements read into the record. Reversing the settlement, the Ohio Supreme Court said that, "Since a settlement upon which final judgment has been entered eliminates the right to adjudication by trial, judges should make certain the terms of the agreement are

Here, Plaintiffs' counsel, Mr. Kenney, made it absolutely clear to the trial court and to the Hospital that the agreement with attorney Garrett regarding Dr. Douglass did not include dismissal of claims against the Hospital. Neither Mr. Valitutti nor Ms. Garrett contradicted Judge Kelly's statement of "understanding" of all parties that the Hospital would continue as a Defendant. Because they planned to present the motion to dismiss the Hospital as soon as the dismissal of Dr. Douglass was executed, it was their affirmative duty to say that they disagreed with Mr. Kenney's interpretation.

There is not even any fair dispute as to interpretation of the agreement stated in open court and not objected to by Defendants. Defendants knew that Plaintiffs' dismissal of Dr. Douglass was to be conditioned upon the case continuing to proceed against the Hospital. Yet, they were permitted to renege on their agreement as stated in open court when the trial court accepted their legalistic argument that the document executed to dismiss Dr. Douglass did not literally preclude dismissal of the Hospital. That was error.

In this vein, Plaintiffs remind this Court of the following quote from Dean Roscoe Pound who, one hundred years ago, impugned what he called the "sporting theory of justice":

> "The idea that procedure must of necessity be wholly contentious . . . leads counsel to forget that they are officers of the court and to deal with the rules of law and procedure exactly as the professional football coach [deals] with the rules of the

---

clear, and that parties agree on the meaning of those terms." 683 NE2d at 339. Given the parties' varying interpretations of the terms read into the record, the *Rulli* Court said there was at best merely an agreement to make a contract because:

> "Where parties dispute the meaning or existence of a settlement agreement, a court may not force an agreement upon the parties. To do so would be to deny the parties' right to control the litigation, and to implicitly adopt (or explicitly, as the trial court did here) the interpretation of one party, rather than enter judgment based upon a mutual agreement." *Id.*

> sport. The effect. . . is not only to irritate parties, witnesses and jurors in particular cases, but to give the whole community a false notion of the purpose and end of law. . . If the law is a mere game, neither the players who take part in it nor the public who witnesses it can be expected to yield to its spirit when their interests are served by evading it." Pound, "*The Causes of Popular Dissatisfaction With the Administration of Justice*" 29 ABA Reports 395, 404-405 (1906).

The Court of Appeals properly declined to accept that the law is "a mere game" and vacated the decision of the trial court by using its "grand reservoir of equitable power." The Court recognized that the Hospital and Dr. Douglass engaged in questionable conduct that led to an "excusable default by Plaintiffs in not securing an on-record acknowledgment of what was obvious from the surrounding circumstances.

Here, there is no detrimental effect to the substantial rights of the Hospital. To the contrary, it is Plaintiffs who have been unnecessarily put to the drastic sanction of dismissal. The Court of Appeals recognized the gross inequity of precluding Plaintiffs an adversary trial on the merits.

C. The Decision Of The Court Of Appeals Is Equally Proper Based On Judge Kelly's Finding Of A Clerical Mistake.

Judge Kelly concluded that resort to a mistake analysis under MCR 2.612(C)(1)(a) was unnecessary because the clerical mistake rule, MCR 2.612(A)(1) was more specifically applicable (Apx pg 17a, n 1). Judge Kelly said that the trial judge was "obviously well aware of what had occurred" that is that "the subsequently drafted order did not accurately memorialize the parties' intent or the agreed upon stipulation placed on the record," and he "should have recognized this clerical error and granted plaintiffs' motion to correct the order to accurately reflect the parties' agreement" (Apx pg 18a). Judge Gage also agreed that the trial judge was "fully aware ... of the entire goings on throughout the case" with the order he signed specifically stating that he was "fully advised in the premises" Apx pg 14a-15a). Court of Appeals Judge Kelly reasoned that MCR

2.612(A)(1) applied because the order entered by the trial court did not accurately reflect what occurred on the record. Judge Kelly specifically rejected the dissent's assertion that the case presented nothing more than plaintiffs' counsel's "*unilateral* understanding of the intent of the order:"

> "Rather, these statements were overt and unambiguous statements of plaintiffs' counsel's intent and the substance of the parties agreement. The trial court deemed plaintiffs' counsel's statements "understood" and agreed to by the other parties when it stated: "I understand. I understand that. I am sure they do, too. Next." (Apx pg 17a).

As Judge Kelly (and Judge Gage) recognized, from the transcript, it is clear that:

> "the parties agreed to dismiss the claim of medical malpractice against Dr. Douglass, but *not* the claim that Dr. Douglass acted negligently to cause plaintiffs' injury nor the claim that River District Hospital was vicariously liable for Dr. Douglass' actions." (Apx pg 17a).

Here, for the reasons set forth by both Judge Gage and Judge Kelly, there is clear and convincing proof that Defendants induced Plaintiffs to agree to dismiss Dr. Douglass, all the time knowing full well that Defendant Hospital intended to bootstrap itself onto its agents' dismissal. The effect of the trial court's Order in this case was to deny Plaintiffs an adversary trial on significant issues against River District Hospital. The trial court professed to express the "preference that the case proceed and be decided on the merits," but legalistically he granted the summary disposition anyway (Apx pg 91a). Based on the applicable law and facts, the Court of Appeals properly vacated the Order dismissing River District Hospital.

D. The Judicially Created Doctrine Of Res Judicata Should Not Be Applied To Extinguish The Malpractice Claim Against River District Hospital; Moreover, This Case Provides No Vehicle To Reexamine *Larkin v Otsego Memorial Hosp Ass'n.*

---

1. Res Judicata Should Be Applied Only To Promote, And Not As Defendants Propose, To Undermine, Fairness.

Just one day after the open court discussion about the intended scope of the Douglass dismissal, Plaintiffs' counsel Jeremiah Kenney explained his reliance upon the trial court's clear expression of both Defendants' understanding at those April 16, 2002 proceedings:

> **MR. KENNEY: No. No. I did not--I didn't think I had to [obtain a specific authorization form the Hospital], Judge, because we had the agreement in chambers on the record. I thought what this order did was give effect to the agreement that we had placed on the record. And the manner in which this was done - - it doesn't state - - clearly it does not say that.**
>
> * * *
>
> **MR. KENNEY: My agreement was with Doctor Douglass's lawyer. But the intent of the dismissal was not to dismiss him with prejudice to operate his [sic: as] *res judicata*. That's what I said three times and that's the intent of my statement here. I do not intend - - "What I don't want to face, Judge, is that I have dismissed the claims against the hospital for the actions of Doctor Douglass ." That's what I specifically indicated was my intent in dismissing Doctor Douglass. I do not intend to dismiss the claims against the hospital for the actions of Dr. Douglass.** (Apx pp 83a-84a; emphasis added).

Reading the transcript in full, it is crystal clear that every attorney in the courtroom knew exactly what Mr. Kenney was doing when he dismissed Dr. Douglass. He was asserting Plaintiffs' right to proceed to trial against the Hospital. The Hospital cannot claim ignorance of Plaintiffs' intent when Mr. Valitutti signed the stipulation.

The salutary tool of res judicata should be used to promote, not undermine, fairness. *Pierson Sand, supra,* 460 Mich at 383. Our Court of Appeals has properly held res judicata inapplicable to bind an insured by an adverse decision in a suit by the insurer because it would "encourage a more or less sporting theory of justice." *Martin v Johnson*, 87 Mich App 342, 348 (1978).

Dissenting Court of Appeals Judge Murray would have affirmed the trial court because

there was nothing in the written stipulation signed by the parties "indicating that the intent of the parties in agreeing to the dismissal of Dr. Douglass was to preserve the claims against River District." (Apx pg 22a). But, Judge Murray's opinion ignores the well-settled law which holds that:

> "The language of a stipulation will not be so construed as to give the effect of waiver of a right not plainly intended to be relinquished. *Rossello v Trella*, 206 Mich 20, 254 [1919]. See 21 MLP Stipulations, §4, p 160." The stipulation is to be interpreted with reference to its subject matter, and is to be read in light of the surrounding circumstances and the whole record. *Whitley v Chrysler Corp*, 373 Mich 469, 474 (1964).

It cannot be concluded in this case that Plaintiffs "plainly intended" to waive their right to try their claim against the Hospital.

Further, the focus by Defendants upon the parties' April 16, 2002 stipulation has always been upon the fact that the dismissal to Douglass was "with prejudice," and the fact that Plaintiffs' counsel's statements in open court preserving the claim against the Hospital were not explicitly preserved in the stipulation. It is equally important to recognize that the writing lacks any language explicitly releasing "all other parties, firms, or corporations who are or might be liable."[9]

Here, it is clear that Plaintiffs did not intend to release the Hospital and would have vigorously objected had such language been included in the stipulation. The surrounding

---

[9] Cf: *Romska v Opper*, 234 Mich App 512, 514 lv den 461 Mich 927 (1999). Judge (now Justice) Markman's majority opinion in *Romska* affirmed the trial court holding that the broad language of the release given to one driver and insurer also released a second driver and his insurer in the three-car accident. Cf: *Batshon v Mar-que General Contractors, Inc*, 463 Mich 646 (2001) [per curiam opinion contrasting *Romska* and unanimously holding that expansive language was limited to more narrowly defined persons and entities being released]. The standard form release in *Romska*, unlike the stipulation here, contained an "explicit merger clause that independently precludes resort to parol evidence." 234 Mich App at 516. Justice Markman also found "no evidence," unlike here, that the release was not fairly and knowingly made.

circumstances are obvious. Under these circumstances, the stipulation was not knowingly entered into by Plaintiffs' counsel. Its effect cannot equitably be fashioned into a res judicata dismissal of the Hospital.

2. Defendants Have Offered No Cognizable Reason To Overrule *Larkin v Otsego Memorial Hosp Ass'n.*

At the trial court and Court of Appeals, Defendants asserted with great fervor that *Larkin v Otsego Memorial Hosp Ass'n*, 207 Mich App 391 (1994) lv den 450 Mich 866 (1995) is factually distinguishable from this case. Both courts agreed. As the majority at the Court of Appeals recognized, "the transcript of the parties' oral argument clearly reflects the parties' intentions and understandings," and they declined to apply *Larkin* because they did not want to broaden that holding to include the oral discussions in this case and because they found that the misconduct of defense counsel in this case made reliance upon the *Larkin* decision unnecessary (Apx pg 13a). The majority also accepted Defendants' argument that *Larkin* could be distinguished because the parties here never explicitly agreed that Dr. Douglass was the Hospital's agent (Apx pg 12a). Now, despite the fact that both Defendants continue to maintain that *Larkin* is distinguishable, they assert that this Court should "disavow *Larkin*." This court should decline the Hospital's invitation.

The Court of Appeals reversed the trial court "in the interest of averting a serious injustice" because "the parties intended to dismiss the claim of medical malpractice against Dr. Douglass, but *not* the claim that Dr. Douglass acted negligently to cause plaintiffs' injury nor the claim that defendant River District Hospital was vicariously liable for Dr. Douglass' actions" (Apx pp 13a; 17a). Therefore, Plaintiffs were entitled to relief from judgment based on the conduct of the parties before the trial court and *Larkin* was ultimately held collateral to the Court of Appeals'

adjudication. Moreover, as Plaintiffs have set forth in detail in Issue I, *Larkin*, like *Theophelis*, predates the 1995 amendment to MCL 600.2925d and the clear language of the statute as since amended renders moot any further need to discuss the *Larkin* opinion.

Based on the rulings appealed from and the clear mandate of the amended statute, there is absolutely no context presented for this Court to use this case to consider the continued viability of the *Larkin* decision.[10] This Court should resist Defendants' exhortation to assume the mantle of their particular group of medical malpractice defendants and their personal perspective and act as "knights-errant, roaming at will in pursuit of our own ideal of truth and goodness ... ." Cardozo, The Nature of the Judicial Process, (New Haven Yale University Press 1921) p 141. Defendants' invitation to this Court to overrule *Larkin* should be declined.

III. To The Extent That The Dismissal Of Dr. Douglass Must Result In The Dismissal Of River District Hospital, The Court Of Appeals Correctly Determined That The Stipulation Dismissing Dr. Douglass Must Be Vacated.

This Court's July 8, 2005 Order permitting supplemental briefs directed the parties to address whether the doctrine of res judicata applies to the stipulated order dismissing the suit

---

[10] Further, the Court of Appeals discussion of *Larkin* is mere dictum:

> "[A]n observation or remark made by a judge in pronouncing an opinion upon a cause, concerning some rule, principle or application of law, or the solution of a question suggested by the case at bar, but not necessarily involved in the case or essential to its determination. Statements and comments in an opinion concerning some rule of law or legal proposition not necessarily involved nor essential to determination of the case in hand are obiter dicta, and lack the force of an adjudication." Black's Law Dictionary (6th ed p 454).

Larkin is not part of what Justice Benjamin Cardozo called "the essential and inherent" in this case. Cardozo, The Nature of the Judicial Process, (New Haven Yale University Press 1921) p 131.

against G. Philip Douglass. Plaintiffs have clearly maintained from the start of this controversy that Dr. Douglass can be dismissed provided that the effect of his dismissal is not also the dismissal of River District Hospital. Plaintiff's counsel reiterated this point at the December 15, 2005 arguments on the applications.

Counsel for Dr. Douglass has feigned concern about continued legal exposure by way of judgment or indemnification if the terms of the stipulation are not enforced, but the prospect of this happening is nil. His trial court attorney, Jane Garratt, first represented both he and the Hospital, then represented only Douglass and then finally reappeared as co-counsel for the Hospital. Coupled with the Hospital attorney's sham designation of Dr. Douglass before trial as the designated representative for River District Hospital, even though the Hospital already had two other employees present, Dr. Douglass is so intertwined with the Hospital, that a falling out between them and an indemnification suit against Dr. Douglass by the Hospital lies beyond incredulity. For Plaintiffs' part, as they proposed at trial more than four years ago, if they are allowed to proceed against the Hospital as MCL 600.2925d clearly provided, the claim against Dr. Douglass will be dismissed.

It was in this vein that the Court of Appeals majority discussed, and implicitly agreed, that the voluntary dismissal of Dr. Douglass amounted to a covenant not to sue, "an agreement not to sue on the existing claim" but that does not extinguish the cause of action, and not a release (Apx pg 12a). As Judge Kelly recognized, "the parties agreed to dismiss the claim of medical malpractice against Dr. Douglass, but *not* the claim that Dr. Douglass acted negligently to cause plaintiffs' injury nor the claim that defendant River District Hospital was vicariously liable for Dr. Douglass' actions." (Apx pg 17a). Accordingly, the Court of Appeals remanded to the trial court

"for entry of an order vacating the stipulation and order dismissing Dr. Douglass with prejudice" (Apx pg 15a). The decision of the Court of Appeals is correct and served to remedy a material injustice to Plaintiffs.

With respect to Dr. Douglass's mistake argument, this case is not analogous to *Limbach v Oakland County Rd Commissioners*, 226 Mich App 389 (1997) lv den 459 Mich 988 (1999). First, *Limbach* concerned two contemporaneous lawsuits **involving the same plaintiff and same defendant.** Second, the mistake in this case is factually like the mistake in *Great American Ins Co v Old Republic Ins Co*, 180 Mich App 508, 510-511 (1989), which the *Limbach* Court allowed was the "type of mistake [which] might be sufficient to allow a trial court to grant relief from judgment."[11] *Limbach*, at 393. Judge Gage explicitly recognized this exception (Apx pg 13a). As the majority at the Court of Appeals recognized, the extrordinary circumstances and the substantial injustice of enforcing the agreement as also allowing dismissal of the Hospital compelled the vacation of the Order based on mistake.

Douglass insists that the outcome of this case is controlled by the Court of Appeals decision in *Rzepka v Michael*, 171 Mich App 748 (1988). *Rzepka* is inapplicable. *Rzepka* was, in relevant part, an affirmance of an appeal from a directed verdict of no cause of action on a claimed violation

---

[11] In *Great American*, the Court of Appeals approved of the trial court setting aside the mediation award **and quoted the trial court's statement that, based on counsel's desire for "a decision on the merits" it was "obvious to me at the time, I think everybody, that there was no acceptance of the mediation award." This is virtually identical to this Court's statement at the time of the stipulation that "I am sure they [i.e., Defendants River District Hospital and Douglass] do [understand] too"** (Apx pg 44a: Tr. 4/16/02, p 10; emphasis added). Again, in the Court's April 17, 2002 ruling is its specific acknowledgment that, **"the record is very clear that counsel for Plaintiff never intended to waive his vicarious liability claims against River District Hospital."** (Apx pg 90a: Tr. 4/17/02, p 35; emphasis added).

of Michigan's Uniform Securities Act. Before trial, plaintiff entered into a consent judgment and proceeded to trial against employees he claimed had personally made misrepresentations to him. The trial court found no evidence of fraud or conversion and held that because the corporation had been dismissed on the securities act claim, the individuals were released on the claim.

On plaintiff's motion to set aside the consent judgment, the trial court rejected plaintiff's mistake claim saying the mistake was unilateral. *Rzepka*, 171 Mich App at 756. The Court of Appeals affirmed based on the express language of the securities act which, on its face, stated that if the seller (corporation) was not liable, its agents could not be liable. As the Court of Appeals majority implicitly found, this case is obviously distinguishable. *Rzepka* involves none of the inequitable sharp tactics defense counsel used in this case.

Here, even though the stipulation with Douglass did not expressly reserve Plaintiffs' in writing claims against the Hospital, both Judge Gage and Judge Kelly recognized from the record made in open court that Douglass and his attorney (as well as River District Hospital and its attorney) knew what Plaintiffs' intentions were and that their attorney was not forfeiting their legal rights against the Hospital (Apx pp 14a; 17a). The Court of Appeals recognized and effectuated the intent of the Plaintiffs to proceed against the Hospital and, as a matter of equitable principles of good faith and fair dealing, simply refused to countenance the shenanigans of the attorneys for Dr. Douglass and the Hospital. The overriding principle here is to effectuate Plaintiffs' intent despite the voluntary with prejudice dismissal of Douglass. Since the order entered did not accurately reflect this intent, the Court of Appeals properly set aside the stipulation to dismiss Dr. Douglass and remanded to the trial court for further proceedings.

Even if the settlement agreement was not a covenant not to sue, the Court of Appeals

properly concluded that, under the circumstances presented, it should be set aside. In *Vickers v St. John Hospital*, 1998 Mich App LEXIS 1330 (unpubl No. 196365 4/14/98) lv den 459 Mich 1001 (1999) [Apx pg 6b], the Court of Appeals held on similar facts that the trial court erred in ruling that the release and settlement of a physician extinguished the hospital's vicarious liability. The panel majority found that:

> "[T]here was sufficient uncertainty regarding the intended terms of the oral settlement, as placed on the record, to require that the trial court, when questions arose regarding the intended meaning of the agreement shortly after it was placed on the record, declare that the purported agreement failed for lack of a meeting of the minds, and leave the parties to further negotiations or trial." 1998 Mich App LEXIS 1330 *6 (footnotes omitted). (Apx pg 7b).

The Court of Appeals added that the decision was especially based on the fact that the same attorney was representing both the doctor and the hospital and that the misunderstanding related to both the legal effect and the terms of the agreement. Analogously here, the attorneys were clearly working in concert. In *Vickers*, as here, the entire on-the-record colloquy took place in the context that the Hospital was expressly retained in the suit.

Just as the fact that plaintiff's counsel in *Vickers* failed to object to defense counsel's use of the term "release" did not mean that there was an agreement by plaintiff as to the term, likewise here, Mr. Kenney[12] made it clear that "what I don't want to face, Judge, obviously is that I have dismissed the claims against the hospital for the actions of Dr. Douglass. I'm not doing that. He was the actor." At this point,tTrial Judge Kelly ended the discussion curtly stating, **"I understand. I understand that. I am sure they do too. Next."** (emphasis added). Surely, Plaintiffs' counsel's failure to pursue the matter further does not, in this context, mean that he was agreeing to dismiss

---

[12] Plaintiffs' attorney here, the late Mr. Kenney, was also the trial attorney for Defendants St. John Hospital and Dr. Boccaccio in *Vickers*, and was well cognizant of the Court of Appeals decision reversing *Vickers* when he placed the agreement on the record in this case.

the Hospital. Here as in *Vickers*, under the circumstances presented, the Court of Appeals properly vacated the stipulation to dismiss Dr. Douglass.

Douglass's other argument in his section III that the Court of Appeals lacked authority to entertain an appeal with respect to his dismissal order is similarly without merit. An appellate court has the power to open or vacate a judgment upon good cause shown whether entered by consent or not. *J L Hudson Co v Barnett*, 255 Mich 465, 469 (1931).

As with other judgments, a party may be granted relief from a consent judgment for the reasons enumerated in MCR 2.612. [once consent judgment is entered, it becomes a judicial act and possesses the same force and character as a judgment rendered following a contested trial or motion]; *Kiefer v Kiefer*, 212 Mich App 176, 179 (1995) [Court of Appeals reviewing motion to set aside consent order modifying alimony brought pursuant to MCR 2.612 (C)(1) (c) for fraud, misrepresentation or other misconduct]. Thus, for example, once a determination has been made that mutual mistake of fact occurred, a court has the power to correct that mistake by vacating the judgment even if it is a consent judgment. *Gordon v Warren Planning & Urban Renewal Comm*, 388 Mich 82, 89 (1972); *Hews v Hews*, 145 Mich 247, 254 (1906) [even consent order may be modified or vacated when it does not express real intent of parties even though mistake is unilateral]; *Horning v Saginaw Circuit Judge*, 161 Mich 413 (1910) [order modifying consent decree is final order which is reviewable only by appeal].

Ahrenberg Mechanical Contracting, Inc. v Howlett, 451 Mich 74 (1996), relied on by Douglass, actually supports Plaintiffs. In *Ahrenberg*, our Supreme Court's unanimous, *per curiam* opinion reversed the Court of Appeals' dismissal of an appeal that it had held barred because the order appealed from was a consent judgment. In *Ahrenberg*, as here, the appellant had timely

sought circuit court relief, but to no avail. 451 Mich at 76. The Supreme Court's decision in *Ahrenberg* makes it clear that merely approving a proposed order as to form and substance does not bar appellate review particularly where the propriety of that ruling is later vigorously litigated in the circuit court and then promptly appealed. See also: *Aubuchon v Farmers Ins Exchange*, 448 Mich 859 (1995) [reversing and remanding to Court of Appeals for consideration of substantive issues where judgment was challenged from outset in trial court].

Here, at the trial court, Plaintiffs timely sought relief under MCR 2.612(C) and specifically moved to "vacate the Order dismissing the Hospital, and revise the Order dismissing Dr. Douglass to make it clear that the agreement was in the nature of a covenant not to sue that does not legally release Defendant River District Hospital."

As Plaintiffs agreed on April 16, 2002, Dr. Douglass can be dismissed provided that the effect of his dismissal does not release Defendant River District Hospital. Otherwise, Dr. Douglass must remain a party Defendant. In that event, he can thank his trial counsel for requiring his continued active presence as a party at trial. Recall that his attorney at the trial court, Jane Garratt, first represented both Defendants, then represented only Dr. Douglass, and then finally reappeared as co-counsel for the Hospital after the stipulation was entered. Then, trial counsel Valitutti for the Hospital requested the sham designation of Dr. Douglass as the Hospital's designated trial representative (Hospital Exhibit D: Tr 4/16/02, p 21), even though River District Hospital already had two other employees present.

The proper outcome of this case is to follow the mandate of §2925d, as amended, and allow what Plaintiffs intended all along - - the dismissal of Dr. Douglass and a trial of the claim against the Hospital.

Relief Requested

For the reasons set forth in the majority and concurring opinions at the Court of Appeals, based on the express dictates of MCL 600.2925d as amended, for the reasons in this Combined Response Brief, and because the claim of Plaintiffs remain in "legal limbo" more than nine years after Mr. Stamplis's catastrophic injury, this Court should affirm the Court of Appeals, and remand this case for trial. Both law and equity compel this result, and this Court should decline to overturn the just decision by the Court of Appeals.

Respectfully submitted,

FIEGER, FIEGER, KENNEY & JOHNSON, P.C.

By: 

Victor S. Valenti (P36347)
Attorney for Plaintiffs-Appellees
19390 West Ten Mile Road
Southfield, MI 48075
(248) 355-5555

Dated: July 14, 2006

STATE OF MICHIGAN
IN THE SUPREME COURT
APPEAL FROM THE COURT OF APPEALS
(Murray PJ, and Gage and Kelly JJ)

JOSEPH STAMPLIS and THEODORA STAMPLIS,

Plaintiffs-Appellees,

v

ST. JOHN HEALTH SYSTEM, d/b/a RIVER DISTRICT HOSPITAL and G. PHILLIP DOUGLASS,

Defendants-Appellants,

and

HENRY FORD HEALTH SYSTEMS, d/b/a HENRY FORD HOSPITAL, et al.,

Defendants.
_____/

Supreme Court Nos: 126980; 127032

Court of Appeals No: 241801

St. Clair Circuit Court No: 01-1051-NH
Hon. Daniel Kelly

PROOF OF SERVICE

STATE OF MICHIGAN)
) SS
COUNTY OF OAKLAND)

Victor S. Valenti, being first duly sworn, deposes and says that he is an attorney with the firm of Fieger, Fieger, Kenney & Johnson, and that on July 14, 2006, he served two copies of Plaintiffs-Appellees' Brief on Appeal and this Proof of Service upon:

Susan Healy Zitterman, Esq.
Ralph Valitutti, Jr., Esq.
Kitch, Drutchas, Et Al.
One Woodward Avenue, 10th Floor
Detroit, MI 48226

Jane P. Garrett, Esq.
Blake, Kirchner, Et Al.
535 Griswold, 1432 Buhl Building
Detroit, MI 48226

John P. Jacobs, Esq.
John P. Jacobs, P.C.
Ste. 600, The Dime Building
Detroit, MI 48226-3499

Bruce R. Shaw, Esq.
Willmarth, Tanoury, Et Al.
645 Griswold, Suite 2800
Detroit, MI 48226

D. Bruce Beaton, Esq.
137 S. Water Street
Marine City, MI 48039

by enclosing same in pre-addressed, postage prepaid envelopes and depositing them in the United States mail located in Southfield, Michigan.

Victor S. Valenti

Subscribed and sworn to before me on July 14, 2006.

Kristine A. Gnagey, Notary Public
Wayne County, Michigan
Acting in Oakland County, Michigan
My Commission Expires: 9/4/2012